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No. 658.

Supreme Court of the United States

OCTOBER TERM, 1946.

PACKARD MOTOR CAR COMPANY,
Petitioner.

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

MOTION OF FOREMEN'S LEAGUE FOR EDUCATION AND ASSOCIATION AND NATIONAL ASSOCIATION OF FOREMEN FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE, AND BRIEF AS AMICI CURIAE

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PACKARD MOTOR CAR COMPANY,
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vs.

NATIONAL LABOR RELATIONS BOARD,
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MOTION.

Foremen's League for Education and Association and National Association of Foremen, corporations not for profit, organized and existing under and by virtue of the laws of the state of Ohio, respectfully move this Honorable Court for leave, through its attorneys, Iddings, Jeffrey, Weisman & Rogers, to file the accompanying brief in this case as amici curiae.

Respectfully submitted,

IDDINGS, JEFFREY, WEISMAN & ROGERS,

By: HARRY P. JEFFREY,

BRIEF.

STATEMENT OF QUESTION INVOLVED.

Could the United States Circuit Court of Appeals properly find that the four classes of petitioner's foremen are "employes" within the meaning of Public Law 198, known as the National Labor Relations Act?

STATEMENT OF FACTS RELATING TO PARTIES FILING WITHIN BRIEF.

The National Association of Foremen is the oldest organization of its kind in the country, with probably the most widely distributed membership both industrially and geographically. It was founded at Dayton, Ohio in 1924 and is incorporated under the laws of Ohio as a corporation not for profit.

The purpose of the National Association of Foremen is "to increase the quality of foremanship by education and to raise the standards and promote the appreciation of foremanship."

Article II, Section 3c, of its constitution, provides as follows:

> "No individual member of the association or organization affiliate of the association may retain such allegiance, and no affiliation shall be granted to any individual or organization which in any manner participates in a labor controversy as a collective bargaining agent."

This position is grounded upon more than twenty years of experience by foremen associated together to promote their own interests. Today, it has more than

23,000 members organized into local clubs in some 135 cities and 33 states throughout the country. Its membership is limited to foremen and other supervisory and technical employes in industry.

The Foremen's League for Education and Association likewise is a non-profit Ohio corporation, organized in 1945. Its purpose is to foster and encourage the formation and development of foremen and supervisory employes' organizations which adhere to the principle of advancement for their members through education and association as a part of management rather than through collective bargaining. Membership is limited to individuals on an annual dues paying basis.

PRELIMINARY STATEMENT.

We address this brief to the single issue as to whether the foremen employed by the petitioner are "employes" within the meaning of the National Labor Relations Act and constitute an appropriate unit for collective bargaining purposes under the terms of the Act. We refrain from a detailed discussion of the facts of the case as these are fully covered by the briefs of the parties. We likewise refrain from a discussion of other issues involved, for the reason that, if the court decides this paramount issue in the negative, a discussion of further questions is unnecessary.

In the various decisions rendered by the National Labor Relations Board on this question, the entire gamut of opinion has been run. In the succession of cases, the board has reversed itself twice and the reasons upon

which the decisions are grounded are equally conflicting. The decision by the United States Circuit Court of Appeals in the instant case affirms the action of the board where the foremen are members of an "independent union", but, by way of obiter, indicates that a different decision would have been reached had the union involved been affiliated with a production workers' union. This opinion is in conflict with a later decision of the board rendered in Matter of Jones and Laughlin Steel Corporation, 66 N.L.R.B., 51.

In 1941, some six years after the effective date of the Act, the board first held a union of foremen to be an appropriate unit for collective bargaining purposes.

Matter of Union Collieries Coal Company, 41 N.L.R.B., 961;
Matter of Godchaux Sugars, Inc., 44 N.L.R.B., 874.

In 1943, the erstwhile minority became a majority, and the board determined that foremen were not "employes" within the meaning of the Act.

Matter of The Maryland Dry Dock Company, 49 N.L.R.B., 733;
Matter of Boeing Aircraft Company, 51 N.L.R.B., 67;
Matter of The Murray Corporation of America (Ecorse Plant), 51 N.L.R.B., 94;
Matter of General Motors Corporation (Detroit Diesel Engine Division), 51 N.L.R.B., 457;
Matter of Soss Manufacturing Company, 56 N.L.R.B., 348.

In 1945, the board again reversed itself in the proceedings in which this case originated.

Matter of Packard Motor Car Company, 61 N.L.R.B., 4.

The board held that Packard Motor Car Company foremen did constitute an appropriate unit for collective bargaining purposes when organized as an independent union. The extreme limit of range of opinion was reached when the board, in Matter of Jones and Laughlin Steel Corporation, supra, ruled that a union of supervisory employes, whether or not affiliated with a production workers' union, was an appropriate unit for collective bargaining purposes and that the members thereof were "employes" within the meaning of the Act.

ARGUMENT.

Legislative History of the Act.

In an attempt to determine the legislative intent of the Congress as to Section 2 (3) of the Act, which defines the term "employes", an examination has been made of the debates and proceedings in both houses during the enactment of this legislation. We submit that the record is bare of any direct reference to foremen and supervisory employes. In this connection, it is important to bear in mind that the Act was approved in July, 1935. At that time, foremen's organizations for collective bargaining purposes or foremen's unions were practically non-existent, and even more important, if they existed, they certainly were not "the causes of labor disputes burdening or obstructing interstate and foreign commerce."

We do not understand the respondent to claim that any direct reference is contained to foremen or supervisory employes in the Congressional proceedings attendant upon the passage of the Act. On the contrary, respondent's counsel has attempted to invoke the definition of "employes" in the Railway Labor Act, as interpreted by the Interstate Commerce Commission. It is significant that the exclusion of subordinate officials of carriers has been accomplished by judicial interpretation and in conformity with an established employer-employe pattern which existed at the time of the passage of the Act. So far as industry generally is concerned, exactly the reverse is true. Prior to 1940 and except for a few

specialized industries where a contrary pattern did exist, foremen and supervisory employes have been a part of and have spoken for management and have been distinguished by well-established custom from the worker at the bench and on the production line.

We repeat that the legislative record is bare of any hint that foremen and supervisory employes were intended to be included in the definition set forth in the Act and that the existing pattern of employee relationship in industry generally at the time of the passage of the Act excluded them from any such interpretation.

Decisions of the Board.

Respondent's brief on page 10 in the court below contains the following language:

> "In rejecting respondent's contention that the statutory term 'employee' should not be held to encompass such supervisors, the Board cited and relied upon its uniform and consistent prior holdings * * *."

We submit that the prior holdings of the board are neither uniform nor consistent. On the contrary, they are contradictory and inconsistent. In addition, since the change of position following the decision in the Maryland Dry Dock case, supra, the decisions of the board holding that foremen and supervsiory employes are "employes" within the meaning of the Act, are all two-to-one decisions. The only uniform and consistent holdings are those of dissenting Board Member Reilly.

The strained and tortured reasoning of respondent's counsel, in asserting that the decisions of the board have been uniform and consistent, is refuted by the opinion

of the board itself in Matter of L. A. Young Spring and Wire Corporation, 65 N.L.R.B., 298. We quote from the majority opinion of the board, which is signed by Chairman Herzog and Member Houston, as follows:

> "The board has, in the Maryland Dry Dock and following cases, construed Section 9 (b) as conferring upon the administrative discretion, not only to determine which of several units is appropriate in order to insure to employes the full benefit of their right to self organization and to collective bargaining, and otherwise to effectuate the policies of this act', but also to decide that some 'employes' may not constitute an appropriate unit in any circumstance. We are now persuaded that this interpretation is unjustified and should not govern future board rulings."

In the case of Jones & Laughlin Steel Corporation, 61 N.L.R.B., 4, the dissenting opinion of Member Reilly contains the following statement:

> "It is certain that we have discarded doctrines developed by this board in the last ten years for insuring complete freedom from management interference to workers in choosing their bargaining representative."

Chairman Herzog, in writing the majority opinion for the board in the instant case, did not hesitate to admit that the board's decisions had been contradictory and conflicting, for we find the following language in his opinion:

> "Two reversals in as many years (once in Maryland Dry Dock and once in the Packard representation case) are enough."

Even a cursory review of the decisions of the board involving the question of whether foremen and supervisory employes are "employes" within the meaning of the Act, reveals the shifting position of the board and the difficulty of the majority in any of the cases in arriving at a determination.

Let us review very briefly this series of "uniform and consistent prior holdings." In Union Collieries Coal Company, supra, and Godchaux Sugars, Inc., supra, the board held that supervisors were "employes" under the Act and that units of such supervisory employes constituted appropriate units for collective bargaining purposes. These decisions stimulated drives to organize foremen for collective bargaining purposes. The result was a threat to efficient production for war purposes. H. R. 2239 was introduced in the 78th Congress, which if enacted would have relieved employers of the legal obligation to bargain with unions of supervisory employes. In the midst of Congressional hearings on this bill, the decision in the Maryland Dry Dock case, supra, was announced. In this case, the prior minority opinion became the majority opinion and that opinion contains the following statement:

> "We are now persuaded that the benefits which supervisory employes might achieve through being certified as collective bargaining units, would be outweighed not only by the dangers inherent in the comingling of management and employes' functions, but also in its possible restrictive effect upon the organizational freedom of rank and file employes."

The principle announced in the Maryland Dry Dock decision, supra, was applied by the board in subsequent

cases for more than a year. But when the board announced its decision in the instant case, the erstwhile majority of the board again became a minority and the newly created majority executed another about-face. Today, the majority of the board has completed the circle of its findings. In the Packard Motor Car Company case, supra, the majority opinion was predicated upon the finding that the foremen involved exercised no real supervisory authority and were mere "traffic cops" in industry. This reasoning was abandoned in the L. A. Young Spring and Wire Corporation case, supra. Here the foremen involved were shown to possess and exercise very real supervisory authority. Nevertheless, the board found that they constituted an appropriate unit for collective bargaining purposes. It is in this decision that the board threw overboard its former decision that Section 9 (c) of the Act was permissive and held it to be mandatory. For the first time, the board held that it had no discretion to determine whether a given group of employes constituted an appropriate unit for collective bargaining purposes except for a matter of classification. In the Jones and Laughlin Steel Corporation case, supra, the board finally determined that a union of foremen was an appropriate unit under the Act even though such a union was affiliated with an organization of production workers.

Uniformity of decision by the majority of the board on this issue is non-existent. The board did adopt a position on this issue, thereafter reversed that position, and still later reverted to its original position and enlarged thereon.

Position of Foremen in Industry.

When a man is promoted from worker to foreman, he becomes a representative of management. He represents management at its initial point of contact with the worker. That has been the traditional position of the foreman in American industry. It is his position today. Upon this position is predicated the rewards, privileges and prestige of foremanship. It is the immediate goal of the worker with ambition and ability. The foreman is the first link in the management chain. This is true, regardless of the exact nature of his duties and whether he is employed in a small or great mass production enterprise. If the position of foreman is to retain its worth for the man occupying it, he must remain a part of management.

The foreman must remain an individual responsible to his employer. If his allegiance and loyalty are divided, his ability to represent his employer is lost. A foreman cannot maintain discipline over and obtain efficient production from those working under his direction, and, simultaneously, be subject to disciplinary action by any individual or group other than his employer or his superiors representing his employer. Any limitation or weakening of the sole responsibility of foremen to employers must result in the destruction of the value and, therefore, the rewards of the position.

Collective Bargaining by Foremen's Union.

When foremen are organized into groups for collective bargaining purposes, it is useless to blink at the fact that they thereby lose their individuality. They must conform to the pattern established by the union organization which bargains for them. Indeed, the primary purpose of collective bargaining is the strength of united action which neutralizes either the strength or weakness of the individual. Whether willingly or otherwise, the individual foreman, who is a member of a group exercising collective bargaining authority for him and his fellow members, must act with and be bound by the decisions and judgment of the group. It is inescapable that his allegiance and loyalty are divided and his ability to act as agent for his employer impaired, however honest he may be.

Throughout most of American industry today where the foreman is unorganized, in any dispute between the worker and management, the foreman sits beside his employer at the bargaining table, both figuratively and literally. His self-interest dictates this stand. When organized into collective bargaining units, his interest and loyalty are either divided or rest wholly with the production worker, whether his local and that of the production workers are affiliated with the same parent union or not.

It is urged that foremen are employes of the corporation or firm by which they are employed. This is, of course, true. It is likewise true that the president, vice-president, department heads and superintendents are

employes in the broad sense. Can it be argued that such employes collectively are appropriate units for collective bargaining purposes? Certainly each of them is a representative of and a part of management. The dividing line for the definition of the term "employee", as used in the Act, is the point dictated by logic and that point is the initial representation of management or the foreman.

Economic Relation Between Foremen and Their Employers.

It is argued that in the absence of collective action the individual foreman must bargain directly with his employer, and that his individual power is so small that it amounts to unilateral determination by the employer of terms and conditions of employment.

The first part of this statement is true. Throughout most of American industry today, the relationship is an individual one as between foremen and employer. Most foremen desire to continue on that basis. In 1944, a national poll was conducted by Dr. Claude Robinson of Opinion Research Corporation, Princeton, New Jersey, among foremen. This poll revealed that only thirteen percent of the foremen contacted either belonged to a union or were interested in joining a union. It is only on an individual basis that the worth of the position of foremen can be maintained and the truth of this is recognized by foremen themselves.

The conclusion that, in the absence of collective action, bargaining on a unilateral basis results, is not true in practice. No matter how selfish an employer may be, a proper differential must be maintained as to wages,

salaries and working conditions between the production worker and the foreman, if efficiency is to be maintained. Incentives must exist to induce men to progress from the ranks of the production worker to those of foremanship, and management, enlightened or selfish, must recognize and maintain worthwhile differentials in order to build efficient organizations.

Restrictions imposed by the Wage and Hour Act during the war undoubtedly produced, at least temporarily, many inequities with respect to compensation paid to foremen and supervisory employes as compared to that paid to production workers. This, in turn, produced discontent among supervisory employes in some economic areas and stimulated the effort to organize them for collective bargaining purposes. Universally, these conditions were corrected as soon as governmental regulations permitted.

If the authority of foremanship is not destroyed by collective bargaining among foremen, the economic strength of the individual foreman will remain and his worth as a part of management will be recognized and rewarded.

Experience of Foremen's Unions.

A portion of the preamble of the National Labor Relations Act recites its purpose in part as follows:

> "To diminish the causes of labor disputes burdening or obstructing interstate or foreign commerce."

It is proper to inquire whether the purpose of the Act has been accomplished or impaired by the most recent decisions of the board construing the term "employee" as

used in the act to include foremen and supervisory employes. It needs no citation of legal authority to recall the testimony of General H. H. Arnold before the House Military Affairs Committee, in 1943, on this point. No more serious indictment of any group of our civilian population was made during the entire war period. This was at the time when the production of essential war material was practically brought to a standstill through the "work stoppage" of foremen organized for collective bargaining purposes and exercising collective bargaining rights in the Detroit industrial area. Far from lessening the disastrous consequences growing from this activity, the enlarged definition of the term adopted by the board but served to increase the difficulties. The result predicted by Board Member Reilly in his series of dissenting opinions was demonstrated in practice. This result must and will continue so long as any segment of management is responsible to any source of authority other than higher levels of management.

Affiliation of Foremen's Unions With Production Workers' Unions.

The instant case presents an organization of foremen not affiliated with an organization of production workers. Since the decision of the board in this case, however, the board has determined that a unit of foremen directly affiliated with an organization which accepts production workers in its membership constitutes an appropriate unit for collective bargaining purposes.

Jones and Laughlin Steel Corporation, supra.

Likewise, since the origin of the instant case, the Government, after its seizure of the coal mines, entered into a contract with the United Mine Workers of America, wherein mine foremen's unions affiliated with the parent organization of miners are recognized for collective bargaining purposes.

While the precise facts involved in these cases are not before the court in the instant case, we feel that the general situation cannot be overlooked in arriving at a determination of the broad question before the court. It is of little value to argue that an organization made up exclusively of foremen and supervisory employes can remain independent. In the present day groupings of large organizations of workers on an industry level, this is extremely doubtful. A campaign to organize foremen is being carried on presently by both national labor union organizations representing and bargaining for production workers.

But experience has repeatedly demonstrated that whether independent or affiliated, in the event of labor disturbances and work stoppages or strikes, union members of one group cooperate with the activities of the other. Indeed, in the event of differences between higher levels of management and organizations of foremen exercising collective bargaining rights, such unions are dependent upon the cooperation of the leaders of the production workers' unions in order to make strikes or work stoppages effective. This type of cooperation has been practiced again and again in recent years in cases where officers of production workers' unions have issued instructions to their members not to replace or perform the

duties of foremen during work stoppages by the latter, even where there was no affiliation between the two groups. When foremen are organized into units affiliated with a parent organization consisting in part of production workers, the responsibility of foremen to higher management simply ceases to exist. When such organization is coupled with the closed shop, at the will of union leaders, anarchy in management results. Such a foreman is beholden to and must follow the dictates of top union officials.

CONCLUSION

It is respectfully submitted that petitioner's foremen are not "employes" within the meaning of the National Labor Relations Act.

Nothing in the legislative history of the Act lends credence to this interpretation, while economic conditions prevalent at the time of its enactment and the purpose of the Act dictate a negative answer.

The decisions of the board reveal a conflicting and contradictory series of opinions, the last of which sanctions organizations of foremen and supervisory employes for collective bargaining purposes without regard to the degree of authority exercised and whether or not affiliated with production workers' unions.

Foremen are a part of management and that relationship is destroyed if the individual foreman loses his identity and becomes a member of a union, thereby dividing his responsibility and loyalty.

It is respectfully submitted that the judgment of the Circuit Court of Appeals for the Sixth Circuit should be reversed.

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SUPREME COURT OF THE UNITED STATES

No. 658.—October Term, 1946.

Packard Motor Car Company, Petitioner, v. National Labor Relations Board.	On writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[March 10, 1947.]

Mr. Justice Jackson delivered the opinion of the Court.

The question presented by this case is whether foremen are entitled as a class to the rights of self-organization, collective bargaining, and other concerted activities as assured to employees generally by the National Labor Relations Act. The case grows out of conditions of the automotive industry, and so far as they are important to the legal issues here the facts are simple.

The Packard Motor Car Company employs about 32,000 rank and file workmen. Since 1937 they have been represented by the United Automobile Workers of America affiliated with the Congress of Industrial Organizations. These employees are supervised by approximately 1,100 employees of foreman rank consisting of about 125 "general foremen," 643 "foremen," 273 "assistant foremen," and 65 "special assignment men." Each general foreman is in charge of one or more departments, and under him in authority are foremen and their assistant foremen. Special assignment men are described as "troubleshooters."

The function of these foremen in general is typical of the duties of foremen in mass production industry generally. Foremen carry the responsibility for maintaining quantity and quality of production, subject, of course, to the overall control and supervision of the management.

Hiring is done by the labor relations department, as is the discharging and laying off of employees. But the foremen are provided with forms and with detailed lists of penalties to be applied in cases of violations of discipline, and initiate recommendations for promotion, demotion and discipline. All such recommendations are subject to the reviewing procedure concerning grievances provided in the collectively-bargained agreement between the Company and the rank and file union.

The foremen as a group are highly paid and, unlike the workmen, are paid for justifiable absence and for holidays, are not docked in pay when tardy, receive longer paid vacations, and are given severance pay upon release by the Company.

These foremen determined to organize as a unit of the Foremen's Association of America, an unaffiliated organization which represents supervisory employees exclusively. Following the usual procedure, after the Board had decided that "all general foremen, foremen, assistant foremen, and special assignment men employed by the Company at its plants in Detroit, Michigan, constitute a unit appropriate for the purposes of collective bargaining within the meaning of section 9 (b) of the Act,"[1] the Foremen's Association was certified as the bargaining representative. The Company asserted that foremen were not "employees" entitled to the advantages of the Labor Act, and refused to bargain with the union. After hearing on charge of unfair labor practice, the Board issued the usual cease and desist order. The Company resisted and challenged validity of the order. The judgment of the court below decreed its enforcement, and we granted certiorari. 328 U. S. xi.

The issue of law as to the power of the National Labor Relations Board under the National Labor Relations Act is simple and our only function is to determine whether the order of the Board is authorized by the statute.

[1] 61 N. L. R. B. 26.

The privileges and benefits of the Act are conferred upon employees, and § 2 (3) of the Act, so far as relevant, provides "The term 'employee' shall include any employee . . ." 49 Stat. 450. The point that these foremen are employees both in the most technical sense at common law as well as in common acceptance of the term, is too obvious to be labored. The Company, however, turns to the Act's definition of employer, which it contends reads foremen out of the employee class and into the class of employers. Section 2 (2) reads: "The term 'employer' includes any person acting in the interest of an employer, directly or indirectly . . ." 49 Stat. 450. The context of the Act, we think, leaves no room for a construction of this section to deny the organizational privilege to employees because they act in the interest of an employer. Every employee, from the very fact of employment in the master's business, is required to act in his interest. He owes to the employer faithful performance of service in his interest, the protection of the employer's property in his custody or control, and all employees may, as to third parties, act in the interests of the employer to such an extent that he is liable for their wrongful acts. A familiar example would be that of a truck driver for whose negligence the Company might have to answer.

The purpose of § 2 (2) seems obviously to render employers responsible in labor practices for acts of any persons performed in their interests. It is an adaptation of the ancient maxim of the common law, *respondeat superior*, by which a principal is made liable for the tortious acts of his agent and the master for the wrongful acts of his servants. Even without special statutory provision, the rule would apply to many relations. But Congress was creating a new class of wrongful acts to be known as unfair labor practices, and it could not be certain that the courts would apply the tort rule of *respondeat superior* to those derelictions. Even if it did, the problem of proof as applied to this kind of wrongs might easily be compli-

cated by questions as to the scope of the actor's authority and of variance between his apparent and his real authority. Hence, it was provided that in administering this act the employer, for its purposes, should be not merely the individual or corporation which was the employing entity, but also others, whether employee or not, who are "acting in the interest of an employer."

Even those who act for the employer in some matters, including the service of standing between management and manual labor, still have interests of their own as employees. Though the foreman is the faithful representative of the employer in maintaining a production schedule, his interest properly may be adverse to that of the employer when it comes to fixing his own wages, hours, seniority rights or working conditions. He does not lose his right to serve himself in these respects because he serves his master in others. And we see no basis in this Act whatever for holding that foremen are forbidden the protection of the Act when they take collective action to protect their collective interests.

The company's argument is really addressed to the undesirability of permitting foremen to organize. It wants selfless representatives of its interest. It fears that if foremen combine to bargain advantages for themselves, they will sometimes be governed by interests of their own or of their fellow foremen, rather than by the company's interest. There is nothing new in this argument. It is rooted in the misconception that because the employer has the right to wholehearted loyalty in the performance of the contract of employment, the employee does not have the right to protect his independent and adverse interest in the terms of the contract itself and the conditions of work. But the effect of the National Labor Relations Act is otherwise, and it is for Congress, not for us, to create exceptions or qualifications at odds with its plain terms.

Moreover, the company concedes that foremen have a right to organize. What it denies is that the statute compels it to recognize the union. In other words, it wants to be free to fight the foremen's union in the way that companies fought other unions before the Labor Act. But there is nothing in the Act which indicates that Congress intended to deny its benefits to foremen as employees, if they choose to believe that their interests as employees would be better served by organization than by individual competition.[2] *N. L. R. B.* v. *Skinner & Kennedy Stationery Co.*, 113 F. (2d) 667; see *N. L. R. B.* v. *Armour & Co.*, 154 F. (2d) 570, 574.

There is no more reason to conclude that the law prohibits foremen as a class from constituting an appropriate bargaining unit than there is for concluding that they are not within the Act at all. Section 9(b) of the Act confers upon the Board a broad discretion to determine appropriate units. It reads, "The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 49 Stat. 453. Our power of review also is circumscribed by the provision that findings of the Board as to the facts, if supported by evidence, shall be conclusive. § 10 (e), 49 Stat. 454. So we have power only to determine whether there is substantial evidence to support the Board, or its order oversteps the law. *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584; *Pittsburgh Plate Glass Co.* v. *N. L. R. B.*, 313 U. S. 146.

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[2] If a union of vice presidents, presidents or others of like relationship to a corporation comes here claiming rights under this Act, it will be time enough then to point out the obvious and relevant differences between the 1100 foremen of this company and corporate officers elected by the board of directors.

There is clearly substantial evidence in support of the determination that foremen are an appropriate unit by themselves and there is equal evidence that, while the foremen included in this unit have different degrees of responsibility and work at different levels of authority, they have such a common relationship to the enterprise and to other levels of workmen that inclusion of all such grades of foremen in a single unit is appropriate. Hence the order insofar as it depends on facts is beyond our power of review. The issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision. It involves of necessity a large measure of informed discretion and the decision of the Board, if not final, is rarely to be disturbed. While we do not say that a determination of a unit of representation cannot be so unreasonable and arbitrary as to exceed the Board's power, we are clear that the decision in question does not do so. That settled, our power is at an end.

We are invited to make a lengthy examination of views expressed in Congress while this and later legislation was pending to show that exclusion of foremen was intended. There is, however, no ambiguity in this Act to be clarified by resort to legislative history, either of the Act itself or of subsequent legislative proposals which failed to become law.

Counsel also would persuade us to make a contrary interpretation by citing a long record of inaction, vacillation and division of the National Labor Relations Board in applying this Act to foremen.[3] If we were obliged to depend upon administrative interpretation for light in finding the meaning of the statute, the inconsistency of the Board's decisions would leave us in the dark. But

[3] The Board had held that supervisory employees may organize in an independent union, *Union Collieries Coal Co.*, 41 N. L. R. B. 961, 44 N. L. R. B. 165; and in an affiliated union, *Godchaux Sugars, Inc.*, 44 N. L. R. B. 874. Then it held that there was no unit appropriate

there are difficult questions of policy involved in these cases which, together with changes in Board membership, account for the contradictory views that characterize their history in the Board. Whatever special questions there are in determining the appropriate bargaining unit for foremen are for the Board, and the history of the issue in the Board shows the difficulty of the problem committed to its discretion. We are not at liberty to be governed by those policy considerations in deciding the naked question of law whether the Board is now, in this case, acting within the terms of the statute.

It is also urged upon us most seriously that unionization of foremen is from many points bad industrial policy, that it puts the union foreman in the position of serving two masters, divides his loyalty and makes generally for bad relations between management and labor. However we might appraise the force of these arguments as a policy matter, we are not authorized to base decision of a question of law upon them. They concern the wisdom of the legislation; they cannot alter the meaning of otherwise plain provisions.

The judgment of enforcement is

Affirmed.

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to the organization of supervisory employees. *Maryland Drydock Co.*, 49 N. L. R. B. 733; *Boeing Aircraft Co.*, 51 N. L. R. B. 67; *Murray Corp. of America*, 51 N. L. R. B. 94; *General Motors Corp.*, 51 N. L. R. B. 457. In this case, 61 N. L. R. B. 4, 64 N. L. R. B. 1212; in *L. A. Young Spring & Wire Corp.*, 65 N. L. R. B. 298; *Jones & Laughlin Steel Corp.*, 66 N. L. R. B. 386, 71 N. L. R. B. 1261; and in *California Packing Corp.*, 66 N. L. R. B. 1461, the Board re-embraced its earlier conclusions with the same progressive boldness it had shown in the *Union Collieries* and *Godchaux Sugars* cases. In none of this series of cases did the Board hold that supervisors were not employees. See *Soss Manufacturing Co.*, 56 N. L. R. B. 348.

SUPREME COURT OF THE UNITED STATES

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[March 10, 1947.]

Mr. Justice Douglas, with whom The Chief Justice and Mr. Justice Burton concur, dissenting.

First. Over thirty years ago Mr. Justice Brandeis, while still a private citizen, saw the need for narrowing the gap between management and labor, for allowing labor greater participation in policy decisions, for developing an industrial system in which cooperation rather than coercion was the dominant characteristic.[1] In his view, these were measures of therapeutic value in dealing with problems of industrial unrest or inefficiency.

The present decision may be a step in that direction. It at least tends to obliterate the line between management and labor. It lends the sanctions of federal law to unionization at all levels of the industrial hierarchy. It tends to emphasize that the basic opposing forces in

[1] "The greater productivity of labor must not only be attainable, but attainable under conditions consistent with the conservation of health, the enjoyment of work, and the development of the individual. The facts in this regard have not been adequately established. In the task of ascertaining whether proposed conditions of work do conform to these requirements, the laborer should take part. He is indeed a necessary witness. Likewise in the task of determining whether in the distribution of the gain in productivity justice is being done to the worker, the participation of representatives of labor is indispensable for the inquiry which involves essentially the exercise of judgment." Brandeis, Business—A Profession, pp. 52–53.

industry are not management and labor but the operating group on the one hand and the stockholder and bondholder group on the other. The industrial problem as so defined comes down to a contest over a fair division of the gross receipts of industry between these two groups. The struggle for control or power between management and labor becomes secondary to a growing unity in their common demands on ownership.

I do not believe this is an exaggerated statement of the basic policy questions which underly the present decision. For if foremen are "employees" within the meaning of the National Labor Relations Act, so are vice-presidents, managers, assistant managers, superintendents, assistant superintendents—indeed, all who are on the payroll of the company, including the president; all who are commonly referred to as the management, with the exception of the directors. If a union of vice-presidents applied for recognition as a collective bargaining agency, I do not see how we could deny it and yet allow the present application. But once vice-presidents, managers, superintendents, foremen all are unionized, management and labor will become more of a solid phalanx than separate factions in warring camps. Indeed, the thought of some labor leaders that if those in the hierarchy above the workers are unionized, they will be more sympathetic with the claims of those below them, is a manifestation of the same idea.[2]

I mention these matters to indicate what tremendously important policy questions are involved in the present decision. My purpose is to suggest that if Congress, when it enacted the National Labor Relations Act, had in mind such a basic change in industrial philosophy, it would have left some clear and unmistakable trace of that purpose. But I find none.

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[2] The Foreman Abdicates, XXXII Fortune, No. 3, p. 150, 152; Levenstein, Labor Today and Tomorrow (1946) ch. VII.

Second. "Employee" is defined to include "any" employee. § 2 (3), 49 Stat. 449, 450, 29 U. S. C. § 152. If we stop there, foremen are included as are all employees from the president on down. But we are not warranted in stopping there. The term "employee" must be considered in the context of the Act. *National Labor Relations Board* v. *Hearst*, 322 U. S. 111, 124; *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 191. When it is so considered it does not appear to be used in an all-embracing sense. Rather, it is used in opposition to the term "employer". An "employer" is defined to include "any person acting in the interest of an employer". § 2 (2). The term "employer" thus includes some employees. And I find no evidence that one personnel group may be both employers and employees within the meaning of the Act. Rather, the Act on its face seems to classify the operating group of industry into two classes; what is included in one group is excluded from the other.

It is not an answer to say that the two statutory groups are not exclusive because every "employee" while on duty—whether driving a truck or stoking a furnace or operating a lathe—is "acting in the interest" of his employer and is then an "employer" in the statutory sense. The Act was not declaring a policy of vicarious responsibility of industry. It was dealing solely with labor relations. It put in the employer category all those who acted for management not only in formulating but also in executing its labor policies.[3]

Foremost among the latter were foremen. Trade union history shows that foremen were the arms and legs of man-

[3] Daykin, The Status of Supervisory Employees under the National Labor Relations Act, 29 Iowa L. Rev. 297; Rosenfarb, The National Labor Policy (1940) pp. 54–56, 116–120; Twentieth Century Fund, How Collective Bargaining Works (1942) pp. 512–514, 547, 557–558, 628, 780.

agement in executing labor policies. In industrial conflicts they were allied with management. Management indeed commonly acted through them in the unfair labor practices which the Act condemns.[4] When we upheld the imposition of the sanctions of the Act against management, we frequently relied on the acts of foremen through whom management expressed its hostility to trade unionism.[5]

Third. The evil at which the Act was aimed was the failure or refusal of industry to recognize the right of workingmen to bargain collectively. In § 1 of the Act Congress noted that such an attitude on the part of industry led "to strikes and other forms of industrial strife or unrest" so as to burden or obstruct interstate commerce. We know from the history of that decade that the frustrated efforts of workingmen, of laborers, to organize led to strikes, strife, and unrest. But we are pointed to no instances where foremen were striking; nor are we advised that managers, superintendents, or vice-presidents were doing so.[6]

Indeed, the problems of those in the supervisory categories of management did not seem to have been in the

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[4] See cases collected in Daykin, op. cit. *supra*, note 3, pp. 298–299.

[5] *International Association of Machinists* v. *National Labor Rel. Bd.*, 311 U. S. 72, 79–80; *Heinz Co.* v. *National Labor Rel. Bd.*, 311 U. S. 514, 520–521.

[6] It is true that for many years some unions included supervisory employees, Beatrice and Sydney Webb, Industrial Democracy (1902) p. 546, fn. 2; Union Membership and Collective Bargaining by Foremen, U. S. Department of Labor Bull. No. 745 (1943); Report of Panel of War Labor Board in Disputes Involving Supervisors (1945) IX; Twentieth Century Fund, op. cit. *supra*, note 3, pp. 67, 216; Northrup, Unionization of Foremen, 21 Harv. Bus. Rev. 496. But organization of foremen on a broad scale is a development of the last few years. Daykin, op. cit. *supra*, note 3, p. 314; Rosenfarb, Foremen on the March, 7 Fed. Bar. J. 168; Note, 59 Harv. L. Rev. 606, 607; Comment, 55 Yale L. J. 754, 756; Foremen's Unions, IX Advanced Management Quarterly J. 110.

consciousness of Congress. Section 1 of the Act refers to "wage rates", "wage earners", "workers". There is no phrase in the entire Act which is descriptive of those doing supervisory work. Section 2 (3) exempts from the term "employee" any "agricultural laborer". But if "employee" includes a foreman, it would be most strange to find Congress exempting "agricultural laborers", but not "agricultural foremen". The inference is strong that since it exempted only agricultural "laborers", it had no idea that agricultural "foremen" were under the Act.

If foremen were to be included as employees under the Act, special problems would be raised,—important problems relating to the unit in which the foremen might be represented. Foremen are also under the Act as employers. That dual status creates serious problems. An act of a foreman, if attributed to the management, constitutes an unfair labor practice; the same act may be part of the foreman's activity as an employee. In that event the employer can only interfere at his peril.[7] The complications of dealing with the problems of supervisory employees strongly suggest that if Congress had planned to include them in its project, it would have made some special provision for them. But we find no trace of a suggestion that when Congress came to consider the units appropriate for collective bargaining,[8] it was aware that groups of employees might have conflicting loyalties. Yet that would have been one of the most important and con-

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[7] Cf. *Jones and Laughlin Steel Corp.* v. *National Labor Rel. Bd.*, 146 F. 2d 833; Comment, 55 Yale L. J. 754, 767–774; Rosenfarb, — op. cit., *supra*, note 6.

[8] Section 9 (b) of the Act provides: "The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

spicuous problems if foremen were to be included. The failure of Congress to formulate a policy respecting the peculiar and special problems of foremen suggests an absence of purpose to bring them under the Act. And the notion is hard to resist that the very absence of a declaration by Congress of its policy respecting foremen is the reason the Board has been so much at large in the treatment of the problem under the Act. See the cases collected in note 3 of the opinion of the Court.

Fourth. When we turn from the Act to the legislative history, we find no trace of Congressional concern with the problems of supervisory personnel. The reports and debates are barren of any reference to them, though they are replete with references to the function of the legislation in protecting the interests of "laborers" and "workers".[2]

Fifth. When we turn to other related legislation, we find that when Congress desired to include managerial officials or supervisory personnel in the category of employees, it did so expressly. The Railway Labor Act of 1926, 44 Stat. 577, 46 U. S. C. § 151, defines "employee" to include "subordinate official". The Merchant Marine Act of 1936, 52 Stat. 953, 46 U. S. C. § 1101 *et seq.*, which deals with maritime labor relations as a supplement to the National Labor Relations Act (see 46 U. S. C. § 1252) defines "employee" to include "subordinate official". 46 U. S. C. § 1253 (c). And the Social Security Act, 49 Stat. 620, 647, 42 U. S. C. § 1301, includes an

[2] See H. Rep. No. 969, 74th Cong., 1st Sess.; H. Rep. No. 972, 74th Cong., 1st Sess.; H. Rep. No. 1147, 74th Cong., 1st Sess.; S. Rep. No. 573, 74th Cong., 1st Sess., pp. 6–7; Hearings, Senate Comm. on Educ. and Labor on S. 2926, 73d Cong., 2d Sess.; Hearings, House Comm. on Labor on H. R. 6288, 74th Cong., 1st Sess.; Hearings, Senate Comm. on Educ. and Labor on S. 1958, 74th Cong., 1st Sess.; 79 Cong. Rec. 2371, 7365, 7648, 7668, 8537, 9676, 9713, 9736, 10320.

officer of a corporation in the term employee.[10] The failure of Congress to do the same when it wrote the National Labor Relations Act has some significance, especially where the legislative history is utterly devoid of any indication that Congress was concerned with the collective bargaining problems of supervisory employees.

Sixth. The truth of the matter is, I think, that when Congress passed the National Labor Relations Act in 1935, it was legislating *against* the activities of foremen, not on their behalf. Congress was intent on protecting the right of free association—the right to bargain collectively—by the great mass of workers, not by those who were in authority over them and enforcing oppressive industrial policies. Foremen were instrumentalities of those industrial policies. They blocked the wage earners' path to fair collective bargaining. To say twelve years later that foremen were treated as the victims of that anti-labor policy seems to me a distortion of history.

If we were to decide this case on the basis of policy, much could be said to support the majority view.[11] But I am convinced that Congress never faced those policy issues when it enacted this legislation. I am sure that those problems were not in the consciousness of Congress. A

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[10] Cf. Federal Employers Liability Act, 35 Stat. 65, as amended, 45 U. S. C. § 51, under which the term "any employee of a carrier" has been applied to foremen. *Owens* v. *Union Pac. R. Co.*, 319 U. S. 715; *Ellis* v. *Union Pac. R. Co.*, 329 U. S. —.

[11] Daykin, op. cit. *supra*, note 3, p. 395; *Rosenfarb*, op. cit. *supra*, note 6; Gartenhaus, The Foreman goes Union, 113 New Republic 563; Comment 55 Yale L. J. 754; Hearings, House Comm. on Military Affairs on Bills relating to the Full Utilization of Manpower, 78th Cong., 1st Sess., p. 899; Northrup, The Foreman's Association of America, 23 Harv. Bus. Rev. 187; cf. American Management Association, Relation Between Management and Foremen in American Industry (1944); *Id.* The Foreman in Labor Relations (1944); *Id.* Should Management be Unionized? (1945).

decision on these policy matters cuts deep into our industrial life. It has profound implications throughout our economy. It involves a fundamental change in much of the thinking of the nation on our industrial problems. The question is so important that I cannot believe Congress legislated unwittingly on it. Since what Congress wrote is consistent with a restriction of the Act to workingmen and laborers, I would leave its extension over supervisory employees to Congress.

I have used the terms foremen and supervisory employees synonymously. But it is not the label which is important; it is whether the employees in question represent or act for management on labor policy matters. Thus one might be a supervisory employee without representing management in those respects. And those who are called foremen may perform duties not substantially different from those of skilled laborers.

What I have said does not mean that foremen have no right to organize for collective bargaining. The general law recognizes their right to do so. See *American Steel Foundries* v. *Tri-City Council*, 257 U. S. 184, 209; *Texas & N. O. R. Co.* v. *Railway Clerks*, 281 U. S. 548, 570. And some States have placed administrative machinery and sanctions behind that right.[12] But as I read the Federal Act, Congress has not yet done so.

MR. JUSTICE FRANKFURTER agrees with this opinion except the part marked "*First*" as to which he expresses no view.

[12] The state laws are discussed in Northrup, The Foremen's Association of America, 23 Harv. Bus. Rev. 187, 196–200.